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SAP AG, SAP AMERICA, INC., and  
TOMORROWNOW, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA; OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DEFENDANTS' RESPONSE TO PLAINTIFFS'  
ADMINISTRATIVE MOTION TO PERMIT  
PLAINTIFFS TO FILE UNDER SEAL  
DEFENDANTS' INFORMATION SUPPORTING  
PLAINTIFFS' MOTION TO MODIFY THE  
PROTECTIVE ORDER AND TO COMPEL  
DEPOSITION TESTIMONY AND FURTHER  
RESPONSES TO REQUESTS FOR ADMISSIONS**

Date: N/A

Time: N/A

Courtroom: E, 15<sup>th</sup> Floor

Judge: Hon. Elizabeth D. Laporte

1 **I. INTRODUCTION**

2 Plaintiffs filed an Administrative Motion to Permit Plaintiffs to File Under Seal  
 3 Defendants' Information Supporting Plaintiffs' Motion to Modify the Protective Order and to  
 4 Compel Deposition Testimony and Further Responses to Requests for Admissions (D.I. 575, and  
 5 hereafter "Administrative Motion"), specifically Plaintiffs moved to file under seal Exhibit T to  
 6 the Declaration of Chad Russell in Support of Oracle's Motion to Modify the Protective Order  
 7 and to Compel Deposition Testimony and Further Responses to Requests for Admissions  
 8 ("Exhibit T"). Additionally, Plaintiffs filed a proposed order granting their Administrative  
 9 Motion (D.I. 575-1).

10 Pursuant to Local Rule 79-5, Defendants file this Response, the accompanying declaration  
 11 of John Youri, and a proposed order in support of a narrowly tailored order authorizing the  
 12 sealing of Exhibit T on the grounds that there is good cause to protect the confidentiality of  
 13 information contained in Plaintiffs' non-dispositive discovery motion. The sealing order  
 14 Defendants seek is not based simply on the blanket Protective Order in this action, but rather rests  
 15 on proof<sup>1</sup> that particularized injury to Defendants will result if the sensitive information contained  
 16 in Exhibit T is publicly released.

17 **II. STANDARD**

18 Federal Rule of Civil Procedure 26(c) provides broad discretion for a trial court to permit  
 19 sealing of court documents for, *inter alia*, the protection of "a trade secret or other confidential  
 20 research, development, or commercial information." Fed. R. Civ. P. 26(c). Based on this  
 21 authority, the Ninth Circuit has "carved out an exception to the presumption of access to judicial  
 22 records for a sealed *discovery* document [attached] to a *non-dispositive* motion." *Navarro v.*  
 23 *Eskanos & Adler*, No. C-06 02231 WHA (EDL), 2007 U.S. Dist. LEXIS 24864, at \*6 (N.D. Cal.  
 24 March 22, 2007) (emphasis in original) (citing *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th  
 25 Cir. 2006)). In such cases, a "particularized showing of good cause" is sufficient to justify  
 26 protection under Rule 26(c). *See Navarro*, at \*7. To make such a showing, the party seeking

27 <sup>1</sup> Because the Local Rules require Court approval based on a declaration supporting  
 28 sealing even when the parties agree as to the confidential status of the document, Defendants  
 submit the Youri Declaration.

1 protection from disclosure under the rule must demonstrate that harm or prejudice would result  
 2 from disclosure of the trade secret or other information contained in each document the party  
 3 seeks to have sealed. *See, e.g., Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th  
 4 Cir. 2006).

### 5 **III. ARGUMENT**

#### 6 Good Cause Supports Filing Exhibit T Under Seal

7 Through the declaration of John Youri, an employee of SAP AG, that accompanies this  
 8 Response, Defendants establish good cause to permit filing Exhibit T under seal. As a threshold  
 9 matter, Defendants provide testimony that Mr. Youri, who is familiar with the information  
 10 contained in Exhibit T, considers that information to be confidential and non-public. *See*  
 11 Declaration of John Youri in Support of Defendants' Response to Plaintiffs' Administrative  
 12 Motion to Permit Plaintiffs to File Under Seal Defendants' Information Supporting Plaintiffs'  
 13 Motion to Modify the Protective Order and to Compel Deposition Testimony and Further  
 14 Responses to Requests for Admissions ("Youri Declaration"), ¶ 1.

15 Moreover, the Youri Declaration demonstrates good cause to protect and seal Exhibit T  
 16 because revelation of its contents would likely cause Defendants to suffer a competitive injury.  
 17 Exhibit T is a Microsoft PowerPoint document. A number of the slides reference and describe  
 18 SAP's standard license agreements with its customers, the terms of which are non-public. Public  
 19 release of this information could adversely effect SAP's future bargaining position with  
 20 customers and provide competitive advantage to SAP's business competitors. Because of the  
 21 competitively sensitive information contained in the document, the disclosure of it could likely  
 22 cause competitive and business injury. *Id.* The Youri Declaration establishes that Defendants  
 23 consider and treat the information as highly confidential. Defendants have continued to protect  
 24 the information contained in Exhibit T from improper public disclosure since the initiation of this  
 25 litigation through a Stipulated Protective Order (D.I. 32) to prevent their private commercial  
 26 information from being improperly disclosed. Under the terms of that Order, Defendants could  
 27 designate documents, deposition transcripts, and discovery responses containing private  
 28

1 information as “Confidential” or “Highly Confidential” prior to producing such documents in the  
2 course of discovery. Exhibit T was designated “Highly Confidential.”

3 **IV. CONCLUSION**

4 Defendants respectfully request that this Court order to be filed under seal Exhibit T,  
5 which Defendants designated as “Highly Confidential Information – Attorneys’ Eyes Only” under  
6 the Stipulated Protective Order in this action.

7 Dated: December 16, 2009

Respectfully submitted,

8 JONES DAY

9  
10 By: /s/ Patrick Delahunty

Patrick Delahunty

11 Counsel for Defendants  
12 SAP AG, SAP AMERICA, INC., and  
13 TOMORROWNOW, INC.  
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